195 | **File No.** ESA 1152

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P.W **DEPARTMENT**

K **BRANCH**

Subject:— Provincial Electricity Board

A [K] 1957

A [K] 1951

File No. ESA 1152-K

Etd. Scott. Slip. 21 A

Std. Sectt. 78A e.

G.R., G D., No. 2408, dated 22-6-22.]

Correspondence

DOCKET SHEET (B)

Subject :—

File No. ESA 1152

P. W DEPT.

K BRANCH.

References :—

Copies from original file ACC)

Date.	To whom sent.	Notes and instructions.

Will R.L.A. kindly go through the agreement entered into by Government with Mr. Advani, Electrical Commissioner, and discuss the matter with me on Monday or Tuesday when it is convenient to him?

Id/-
2.7.49.

R.L.A.

W.W.W./-

CONFIDENTIAL. Office of the R.L.A.

The question raised for the R.L.A.'s consideration is whether under the Agreement entere-d into by Government with Mr. Advani, Electrical Commissioner, it is incumbent upon Government to appoint him as Chairman of the Bombay Electricity Board and whether Mr. Advani would be entitled to claim damages in case he is not so appointed.

The question is not quite free from doubt. Government can, however, claim to be excused from the performance of the contract on the following three grounds:

(i) Although it is true that the preamble of the agreement definitely contemplates the passing of an Act by the Government of India and the setting up of a board called the Bombay Electricity Board under the provisions of that Act, the operative clauses are so worded that, taken together with the next su--cceeding ground of the contract being unlawful, it would be possible to argue that the contract does not impose any obiligation upon the Government to employ Mr. Advani as the Chairman of the Board. Attention is invited in this connection to clauses 1 and 2 in particular which must be quoted in extenso:

"(1) The Government shall employ and the employee shall serve the Government as Officer on Special Duty as from the said 21st day of May 1946 until the constitution of the said Board on the terms and conditions as hereinafter provided.

(2) From and after the date of the constitution of the said Board under the said Act the employee shall serve as the Chairman of the said Board and authority."

It will be observed from the underlined words in these two clauses that whereas Government assumed the obligation of employing Mr. Advani as Officer on Special Duty no such obligation was in terms provided for in Clause(2) in relation to his appointment as the Chairman of the Board. There is great significance in this difference in the wording of the two clauses. That distinction was based upon the cardinal consider--ation that at the time of the Agreement it was not known whether the Provincial Government would have the authority for making appointment, for ought we know, the Act may have provided otherwise and given power to the Central Government or to some other authority. That ag--ain is made clear from the concluding words in Clause (2) that "the employee will submit himself to the orders of the competent authority" which shows that the employee was not even then regarding himself as being employed under the Provincial Government in his capacity as "Chairman". No doubt where there is a promise to serve but no express promise to employ, the question whether such a promise is to be implied depends upon the reasonable construction of the contract in the light of th e surrounding circumstances; and in modern times the Courts are more prone than formerly to imply the agreement to employ. It must be confessed that if the contract is read as a whole the employee may make out a plausiable case that mutuality was implied. Thus he may point out that almost all the incidents of a contract of service are provided for in the agreement, as for example, aggregate period of service, the salary, the conditions of service & the duties etc. which latter are indicated by reference to the provisions of the Act and the Rules thereunder which were to be passed thereafter. Even so, the

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employee's claim can be met by relying on the important circumstances that at the time when the contract was made the Government of Bombay was not in the position of an employer with respect to the appointment of the Chairman. It was not even known whether they would be invested with the power of an employer. That is quite apparent from the tenor of the agreement and from the distinction drawn above between the first two clauses and also from the fact that the duties and the conditions are not defined as they would be in any contract which implies mutuality, but were left to be determined by something which was beyond the control of the employer. Relying upon these factors Government can maintain that there was no obligation upon them to employ Mr. Advani as the Chairman; and that in consideration of the fact that even after his superannuation he was going to be employed as Officer on Special Duty on a particular salary, Mr. Advani consented to serve also upon the Board, i.e. the Agreement is consistent with the supposition that Government had the option to require Mr. Advani to serve on the Board if they so desired. This ground can be re-inforced by the next succeeding ground namely, that the agreement is unlwaful and the Court cannot read an implied term into a contract which is in itself unlawful.

(2) The unawful nature of the agreement arises this way. Under section 23 of the Indian Contract Act the consideration or object of an agreement is lawful unless it is of such a nature that if permitted it would defeat the provisions

of any law or.... the Court regards it as opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the ob--ject or consideration is unlawful is void. "

The agreement in the present case, if construed as implying an obligation upon Government to employ Mr. Advani as the Chairman of the Board on a salary of Rs. 4,000/- per month, would be such that its object would defeat the provisions of the Electricity Supply Act, 1948 and would also be opposed to public policy. It will be recalled that the agreement was made at a time when contracting parties were not certain and could not be certain of what the provisions of the Act were eventually going to be. And it goes without saying that if the provisions were such as would run directly counter to the terms of the Agreement, that Agreement would have been unlawful as being forbidden by law. The Act as eventually passed invests the Provincial Government under section 5 with the power to constitute the Board and to appoint its members. Of the members one shall be a person of proved administrative ability and commercial experience; one shall be an elect--rical engineer with wide experience and one shall be an accountant with experience of the electricity supply industry or other public utility. One of the members possessing any of these qualifications specified shall be appointed by the Provincial Government to be the Chairman of the Board."

This implies that the Chairman must possess any of these qualifications. It is presumed that Mr.

Advani.....

Mr. Advani does posses any of these necessary quali-
-fications. If he does not, then as will be pointed
out later the contract will become impossible of
performance. Even if he does, the Act expects the
Provincial Government as the statutory authority which
is invested with the power of making the appointment
to exercise its discretion in the best public interest
in making the selection of the person. The Provincial
Government is expected to select the fittest candidate
having regard to the persons available at the time
of making the appointment. To fetter that discretion
in advance even of the enactment and to compel Gove-
-rnment to nominate a person who may not, in the ch-
-anged circumstances of today, be necessarily the
best qualified candidate, whould, in my opinion,
defeat the provisions of the Act by effectively dest-
-roying the discretion which the statute given to
Government. Similarly, under section 78 Government
have been given the power to make rules, providing the
remuneration allowances and conditions of service
of the Members of the Board. This is again a power
of making of the Board. This is again a power of
making subordinate legislation which the legislature
has delegated to the Provincial Government; and the
Provincial Government is expected to exercise that
power in the best public interest. That power cannot
be trammelled and its exercise made inpossible by a
contract in advance that the incumbent of the office
must be given a salary of Rs. 4,000/- p.m. That
is virtually compelling Government to make a rule
which would again defeat the provisions of law under
which Government like the legislature must have
absolute discretion to make any rules they choose

consistent with public interest. The experession "defeat the provisions of any low" has been widely construed to include defeating of the object of Law also. (See Fateh Singh vs. Sanwal Singh I.L.R.) (Allahabad P. 751).

For the same reasons it can be said that the object of the agreement is opposed to public policy. No doubt it is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it, and that no new heads of public policy are to be invented. This does not, however, affect the application of the doctrine of public policy to new cases within its recognized bounds, affect the application of the doctrine of public policy to new cases within its recognized bounds, but the test is always whether the enforcement of the impugned contract leads or is likely to lead to injurious action. In this case the Act requires Government to exercise its discretion in the best public interest both in making the appointment and in fixing the remuneration and in respect of the latter Government must have due regard to the State of the Exchequer. Any contract which makes it impossible for Government to exercise that discretion would be opposed to public policy as being injurious to proper public action. There is no direct case in point; but in the case of Huges vs. Statham, (1825) Barnewall & Cresswell's Reports Vol. IV p. 187), it was observed that a Town-clark is naturally consulted as to the persons to employed in conducting prosecutions and he ought to be in a situation to give unbiased advice so that a contract which made such advice impo-ssible was held to be void on the ground that it was

opposed to public p

policy. The principle of that case is that an agree-
opposed to public/ment the natural effect of which is to induce a public officer to englect his duty is invalid. (Chitty on Contracts, Nineteenth Edition, page 326.) Much more so would be a contra-ct which makes tit impossible for Government to perform its duties. On the same ground Government can main--tain that a contract which makes it impossible for them to exercise their statutory discretion in the selection of the candidate and in fixing his remuneration is opposed to public policy.

(3) Finally, assuming that an obligation to appoint Mr. Advani as the Chairman of the Board is to be implied, as a term of the contract, Government may claim to be excused from the performance thereof on the ground that such performance has become imp--ossible. Under section 56 of the Indian Contract Act a contract to do an act which after the contract is made becomes impossible or by reason ~~fe~~ of some event which the promisor could not prevent unawful becomes void when the act becomes impossible or unawful. This section is more widely worded than the corresponding principle known to English Common Law. Clause 3 of the agreement provides that the aggregate term of service of the employee as Officer on Special Duty and as Chairman of the said Board shall be five years commencing from the said 21st May of 1946. That means that even if the appointment be made immediately Mr. Advani would not be able to serve the Board for more than one year and 9 months at the most. Section 8 of the Act, however, provides that the Chairman shall, in any case, hold office for five years and on the

first constitution of the Board the Chairman shall hold office for seven years. An appointment for 1 year and 9 months would be directly opposed to the provisions of this section. It is forbidden by low in the sense of that experession used in section 23 of the Contract Act, and therefore such an appointment would be unlawful. It will not, therefore, be feasible for Mr. Advani to claim that he should be appointed for 1 year and 9 months. Nor can Government require him to serve for that shorter period. If Mr. Advani were to maintain that he would be content merely with the making of the appointment without reference to the tenure, as the section stands, he is inviting Government to do something which Government had never contracted to do namely, appointing him for a term of five years beyond the term stipulated in the contract which would be the inevitable effect of Government making his appointment now. The device suggested by Mr. Advani of making a new flexible agreement providing for three months notice is not legally feasible as it would be contrary to the express terms of section 8, the object of which is to ensure security of tenure. No compensation is also claimable under the last paragraph of section 56 because both Government and Mr. Advani had equal knowledge, perhaps Mr. Advani had better knowledge than Government, in this case.

I have discussed this question with the Advicate General(Mr. M.P.Amin) and although he feels like me that the position is not free from doubt he is of the opinion that this is a case where the risk of not making Mr. Advani's appointment may

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be taken, if Government on other considerations wish to adopt that course; and in case the matter is taken to the Court of Law, the claim for compensation should be defended.

Sd/-
Rememberancer of Legal Affairs.

Chief Secy.

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W.W.W./-

CONFIDENTIAL.

Please see pages 21 and 22 of the file placed below and pages 9 to 15 of File No. 9891/36 P.W.D. El. Br.

2. I was asked by H.P. and H.M.(.P.W.D.) to examine the provisions of the agreement entered into with Mr. P.B. Advani, Electrical Commissioner, in consultation with the Rememberancer of Legal Affairs.

3. The Rememberancer of Legal Affairs has given his opinion at page 3 to 10. I also took an opportunity of discussing the matter with him and Secretary, P.W.D.(Mr. Gurjar).

4. I submit that the agreement is unfair to Government and that we should not allow our judgment to be fettered by it in selecting the best person available for appointment as Chairman of the proposed Electricity Board. The qualifications prescribed under the Electricity (Supply) Act, 1948, for the post of Chairman are such that it will be exceedingly difficult to find a suitable person. It will also be not easy to appoint two or more than two other Members of the Board possessing the requisite qualifications. The question of the salaries of the Chairman and other Members of the Board will also present considerable difficulty.

5. Further according to section 8 of the Act, the term of appointment of the first Cheirman will be 7 years and of other Members, except one, 5 years. The term of appointment of this one Member will be 3 years.

6. These are extraordinary provisions but as

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will take some time before they are amended in case Government are so inclined to do, we shall have to com-ply with them. I believe that Mr. Advani is an electrical engineer but on going through the file relating to his appointment as Electrical Commissioner I feel that it would be desirable to appoint another person younger than Mr. Advani as the first Chairman especially as he would ordinarily hold office for about 7 years. I therefore suggest that having regard to the opinion given by the Rememberancer of Legal Affairs, which is concured in by the Advocate-General, we should consider whether it would not be advantageous to terminate the agreement with Mr. Advani after giving him adequate notice and to proceed to constitute a a Board by appointing another person as Chairman and two more suitable persons as Members.

Id/-
20.8.49.

H.M. (P.W.D.)As shri R.B. Advani goes to home from 31st January 1951, prior to retirement from since as from 21.5.51 on the expire of contract, ~~there~~ these papers requiring the Chairmanship of the Board may be filed.

So far as the Constitution of the Electricity Board is concerned, the matter is still consideration and would be put up later.

for further Corrsp.
Pl. see file ESA 1152.

Id/-

19.1.51.

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